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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 613

THE DEUTSCH COMPANY,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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OCTOBER TERM, 1959

No. .....

THE DEUTSCH COMPANY,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit made on May 5, 1959, decreeing enforcement of the Order of the National Labor Relations Board against Petitioner, and denying the Petitioner's Petition to Modify and Set Aside the Order of the National Labor Relations Board, despite Petitioner's contention that the Board denied it due process and failed to afford it a fair hearing by refusing to hear or consider relevant and material evidence.

Citations to Opinion Below.

The Decision and Order of the National Labor Relations Board [R. 29-76; 80-85] is reported at 118 N.L.R.B. 1294 (1957).

The Opinion of the United States Court of Appeals for the Ninth Circuit [R. 454-467] printed in Appendix B hereto, is reported at 265 F. 2d 473 (C. A. 9, 1959).

Jurisdiction.

This case is before this Court on a Petition for Writ of Certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit in granting the National Labor Relations Board's Petition for Enforcement of an Order, and in denying the Petitioner's Petition to Modify and Set Aside the Orders of the National Labor Relations Board. The judgment of the Court of Appeals for the Ninth Circuit was entered on May 5, 1959. [R. 468-470.] Rehearing was denied on November 2, 1959. [R. 471.] The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1) and 29 U. S. C., Sections 160 (e) and (f).

Questions Presented.

1. Did the National Labor Relations Board deprive the Petitioner and its employees of a fair hearing when, upon a complaint for refusal to bargain, the Board failed and refused to take testimony that the union asserting to be the bargaining agent was not the union certified by the Board and the elected officials of the certified union had abandoned their offices, which had been usurped by non-elected officials of a separate union who were purporting to act as the bargaining agent for the Petitioner's employees although they had no authority under law so to do?

2. Did the National Labor Relations Board deprive Petitioner and its employees of due process of law when it purported to hold a certification election while the Petitioner's Petition for Rehearing and Reconsideration and Stay of the Election was pending and before the Board made its Ruling upon the Petition for Rehearing which state of affairs caused confusion with regard to the election so that only a fraction of the number of eligible voters among the employees voted at the election?

3. Did the National Labor Relations Board erroneously and arbitrarily and in an abuse of its process order the Petitioner to bargain with a union in an inappropriate unit for the purposes of collective bargaining where the Board failed and refused to receive and consider testimony and evidence that since the time of the Representation Hearing there had been newly discovered evidence of a change of circumstances based upon an agreement between the Petitioner and the certified union, and ratified by the union's members, to conduct a secret ballot vote of Petitioner's employees in which they voted in one of its plants as a separate unit not to be represented by the Union?

Statutes Involved.

The statutory provisions involved are: United States Constitution, Fifth Amendment; National Labor Relations Act, 29 U. S. C., Sections 157, 158(a)(1), 158(a)(3), 158(a)(5), 158(d), 159(a), 159(b)(2), 159(c)(1), 160(b), 160(e), 160(f); Administrative Procedure Act, Title 5, Sections 1004(b), 1005(d), 1007(b), 1009(e); Rules and Regulations of the National Labor Relations Board, Code of Federal Regulations, Title 29, Labor, Section 102.68, formerly 102.60.

These are appended in Appendix A, *infra*.

Statement of the Case.

1. Basis for Federal Jurisdiction.

This is a case to review the order of the United States Court of Appeals for the Ninth Circuit decreeing the enforcement of an Order of the National Labor Relations Board that the Petitioner cease and desist from violating Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. (29 U. S. C., Sections 158(a)(1) and 158(a)(5).) The National Labor Relations Board has jurisdiction under Section 10(b) of the National Labor Relations Act (29 U. S. C., Section 160(b)). The United States Court of Appeals for the Ninth Circuit had jurisdiction to review the orders of the Board by reason of the Petitions of the National Labor Relations Board and the Petitioner under Section 10, subsections (e) and (f) of the National Labor Relations Act. (29 U. S. C., Sections 160(e) and 160(f)).

2. Description of Employer's Plants and Employees.

The Deutsch Company (sometimes hereinafter referred to as "Employer") is a manufacturing corporation organized and incorporated under and pursuant to the laws of the State of California. Since 1954, it has operated two (2) plants, the main manufacturing plant, which also contains assembly and shipping facilities at 7000 South Avalon Boulevard (sometimes hereinafter referred to as the "Avalon Plant"), and an assembly and shipping and receiving plant for specific Army-Navy fittings and electric couplings at 6345 Regent Street, Huntington Park, California (sometimes hereinafter referred to as the "Regent Plant") [R. 164-165].

The Avalon Plant is a machine shop operation; the majority of the Avalon employees are highly skilled machine operators; even the Avalon assemblers are semi-

skilled operators, who are capable of doing and do a substantial amount of work on drill presses [R. 311-313]. The Regent employees are unskilled assemblers and packagers, none of whom, for example are qualified to do, nor do they work on drill presses [R. 313-314].

There is a substantial and significant difference between the items produced by each of the plants [R. 165]. The Avalon Plant manufactures and assembles valves, rivets and various screw machine products [R. 311]. The Regent Plant, however, does no manufacturing; it is involved only with assembling a limited class of Army and Navy electronic and aircraft components [R. 176, 311]. The type of assembly work is substantially different, involving different skills and working conditions.

Each plant has its own sales department, its own sales catalogs, and its own packaging and shipping and receiving departments [R. 168-169, 317].

Each plant has its own separate and autonomous manager and supervisor, Mr. Philip Holzman at Avalon and Mr. Edward Jones at Regent [R. 171-172, 315-316].

There are twenty-two (22) general job classifications at the Avalon Plant, whereas there are only four (4) at the Regent Plant. The four (4) at the Regent Plant, are duplicated in name only at the Avalon Plant. There is no identity or duplication in the type of work done or in the product worked upon. The four (4) job classifications which use the same names at each Plant are: assembler, packager, shipping, and receiving clerk, and production and control clerk [R. 311-313].

Regent Street receives eight and one-third per cent (8⅓%) of the output of the Avalon Plant for its material components requirements for assembly functions [R. 311].

The Avalon Plant at present has approximately three hundred seventy-five (375) employees, while the Regent Plant has eighty-five (85) employees. Two-thirds (⅔) of the Avalon Plant employees are male, and one-third (⅓) female; at the Regent Plant, seven-eighths (⅞) of the employees are female, and one-eighth (⅛) male [R. 313]:

The Avalon Plant works on two (2) shifts, with different shift hours for male and female employees and different rest periods for male and female employees. The Regent Plant, however, works only one (1) shift. The Avalon Plant regularly schedules overtime work on Saturday every other week. Thus, its working schedule alternates between a five (5) day week and a six (6) day week. The Regent Plant very seldom, and then only irregularly, schedules any overtime work [R. 165, 313-315].

There is no uniform personnel policy with respect to the two (2) plants. For example, incentive pay is awarded at the Avalon Plant, but not at the Regent Plant. There is no interchange of personnel between the Plants, nor any practice of giving seniority to the employees of both plants on one seniority list. Moreover, rates of pay are different because the employees perform different tasks [R. 315].

A majority of the "Employer's" production and maintenance employees at its Avalon Plant do not desire to be represented by the Union for the purposes of collective bargaining, while a majority of the production and maintenance employees at Regent did favor representation by the Union [R. 247].

3. Chronology of Events With Regard to Representation and Collective Bargaining at "Employer's" Plants.

Commencing with May of 1955, the United Industrial Workers Local 976, AIW-AFL-CIO, as it was then named (sometimes hereinafter referred to as the "Union") conducted an organizational drive at "Employer's" plants.

On March 28, 1956, the Union filed a Petition for Certification of Representatives, in Case No. 21-RC-4365. The Petition alleged as the address of the "Employer" only the Avalon Plant address [R. 162].

Representation hearings in the said Representation Case were held on May 8, 10, 11 and 17, 1956. Upon the Representation Hearings:

(a) The International Association of Machinists, District 94, AFL-CIO, and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO were intervenors [R. 160-162];

(b) Some evidence as to the appropriate unit for collective bargaining was introduced, but the Petitioning Union, the United Industrial Workers, did offer to stipulate on all of the evidence presented at the Representation Hearing that the unit of "Employer's" employees appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is the separate plant unit which stipulation was and is acceptable to the "Employer" [R. 189-195];

(c) There was no evidence introduced as to (nor was there any way at that time of obtaining the evidence without a self-determination election) of the sentiment of the "Employer's" employees at each of

the "Employer's" plants to determine their desire with reference to being represented for collective bargaining purposes by a Union.

In spite of the lack of any evidence upon the Representation Hearing to support a finding that the appropriate unit of "Employer's" employees for the purposes of collective bargaining was the entire company unit, and, notwithstanding the stipulations acceptable to the Union and the "Employer", the Board, on or about July 9, 1956, made its Decision and Direction of Election in Case No. 21-RC-4365, wherein it directed that an election be conducted in the Company unit. The Board did, however, find [General Counsel's Ex. 2] that a separate unit at each of "Employer's" plants would be appropriate for the purposes of collective bargaining, as well as the Company unit, consisting of both plants [R. 211, 338-341].

On or about July 24, 1956, "Employer" filed with the National Labor Relations Board its Petition for: (1) Rehearing and Reconsideration by the Board of its Decision and Direction of Election, and (2) an Order suspending election pending determination of the Petition and further decision and order of the Board; and (3) an Order authorizing and permitting Petitioner to offer and submit new and additional evidence; and (4) an Order vacating previous Decision and Direction of Election; and (5) an Order dismissing the Petition of the Union for certification [Resp. Ex. 6; R. 320, 424-440].

On or about August 8, 1956, the Regional Office of the Board purported to hold an election. Neither the "Employer" nor its Labor Relations Consultants, nor its attorneys, had received any notice in any manner whatso-

ever from the Board as to its decision on the said Petition of the "Employer" then pending before the Board [R. 320-330].

The purported Election was held on August 8, 1950, over the objections of the "Employer." There was no employees' list of "Employer's" employees in the hands of the persons purporting to conduct the election, nor was the election held on the Plant premises. Less than forty per cent (40%) of the "Employer's" employees eligible to vote cast ballots at that election [R. 248-249].

On August 10, 1950, the Board by telegram notified the "Employer", by notifying its Labor Relations Consultant and its Attorneys, of its ruling upon the "Employer's" said Petition, by stating that the said Petition "is hereby denied" [Resp. Exs. 8 and 9; R. 251-254, 333, 449-451].

On August 20, 1950, the Board issued a Certification of Representatives, which certified the United Industrial Workers, Local 976, AIW-AFL-CIO, as the representative of the "Employer's" employees in the Company Unit for the purposes of collective bargaining [General Counsel's Ex. 3; R. 211, 342-343]. This Order was amended on October 29, 1950, to change the name of "United Industrial Workers" but in no other respects. [General Counsel's Ex. 4; R. 211, 343-344].

On September 14, 1950, Anthony Doria, the Secretary-Treasurer of the Union, wrote a letter to the "Employer" requesting arrangements for negotiations between the Union and the "Employer." A copy of the letter was sent to H. DeVoe Rea & Associates, the Labor Relations Consultants of the "Employer," the retaining of which firm as consultants, as appears on the face of the letter [Gen-

eral Counsel's Ex. 5; R. 345-347] was known to the Union Thereafter, Mr. Thomas Aiken of the office of H. DeVoe Rea & Associates, telephoned Mr. Doria, and a meeting was arranged [R. 273].

On September 24, 1956, the "Employer" sent to the Union a telegram advising that any meetings should be arranged with H. DeVoe Rea & Associates, its Labor Relations Representatives [Resp. Ex. 3; R. 375].

A meeting was held on September 26, 1956, between H. DeVoe Rea and Thomas Aiken, representing the "Employer", and Anthony Doria, representing the Union, in the offices of H. DeVoe Rea. At that time, the "Employer" bargained with the Union on various subjects which might be provisions in an Agreement between them [R. 275-277]. Some of these subjects of bargaining were set forth in a memo by Mr. Doria in his own handwriting and given to Mr. Rea [Resp. Ex. 1; R. 277, 372-373].

Thereafter, Mr. Doria left the city for approximately two (2) weeks. In the interim, two (2) of the business agents of the Union at a chance meeting had a discussion with Mr. Philip Holzman, the manager of the Avalon Plant, in which they suggested that a consent election be held at the Avalon Plant to determine whether a majority of the employees at the Avalon Plant desired to be represented by the Union. Both the business agents and Mr. Holzman agreed to go back to their principals for further discussion of the proposal by the business agents [R. 303-305].

During the latter part of October and early November, 1956, Mr. Thomas Aiken had telephone discussions with Mr. Doria with regard to the Union's proposal that a

consent election be conducted by the Respondent and the Union at the Avalon Plant [R. 277-282].

On October 2, 1956, the Union filed an Unfair Labor Charge against the Company, alleging violations of Section 8(a)(1), (3) and (5) of the Act. On November 1, 1956, the Company wrote to the Board denying the truth of any allegation in the charge of October 2, 1956. No Complaint was ever issued on that charge.

On November 11, 1956, the majority of the Union members at its meeting authorized the Union to enter into an agreement for the conducting of a consent election at the Avalon Plant by the Union and the Company [R. 337, 368-372].

On November 12, 1956, a meeting was held at the offices of H. DeVoe Rea, at which there were present: Anthony Doria, the Secretary-Treasurer of the Union and Peter Lentini, the Business Agent of the International with which the Union is affiliated, and the President of the Union, and Mr. Thomas Aiken of H. DeVoe Rea & Associates, and Mr. Philip E. Holzman, the General Manager of the Avalon Plant, and Mr. Edward Jones, the General Manager of the Regent Plant. After extensive negotiations and bargaining between the Union and the "Employer", a written agreement was entered into [Resp. Ex. 4; R. 375-377], whereby the Union agreed with the Company as follows: That a consent election would be conducted by the Union and the "Employer" on Friday, November 16, 1956, at the Avalon Plant, in order to establish whether the Union represented a majority of the production and maintenance employees at the Avalon Plant; the payroll date of July 8, 1956, would be used in the election to determine eligibility of employee voters (This was the same payroll date as was used in the

Board-Conducted election in August); production and maintenance employees would be those fitting the description in the Board's purported Decision and Direction of Election; observers of the conduct of the election and the manner of challenging of ballots were agreed upon; if the majority of the employees voting, voted for the Union, then the "Employer" would immediately enter into further bargaining negotiations with the Union for the Avalon Plant on such additional subjects as to which bargaining was desired by the Union; the "Employer" would continue to bargain with the Union with regard to the Regent Plant, regardless of the outcome of the election; if a majority of the employees voting, voted against representation by the Union, the Union would refrain from any type of harassing action against the "Employer," including any work stoppage or interference of any kind with production; by direct implication, the Union recognized that the appropriate unit of "Employer's" employees for collective bargaining was and is the separate plant unit, and the Union would accept the desires of the majority of the employees at the Avalon Plant as evidenced by the results obtained upon the consent election to determine whether or not the Union would represent the employees at the Avalon Plant. [R. 238-240, 306, 322-324].

The Consent Election was held on November 16, 1956 and one hundred sixty-nine (169) votes were cast for no Union representation, while only one hundred thirty-seven (137) votes voted for the Union [R. 247].

On November 21, 1956, the Union filed with the Board its Charge, which alleged a violation by the "Employer" of Section 8(a), (1) and (5) of the Act. The Union did not advise the Regional Director or any of his staff that the Union and Respondent had entered into the

written agreement of November 12, 1956, or that a Consent Election had been held or what the results of the election were [R. 250-251].

On December 4, 1956, the "Employer," by Thomas Aiken of its Labor Relations Consultants, had a meeting lasting approximately four (4) hours, with Anthony Doria, Peter Lentini, Dorothea Powell, David Castro and Benny Benedetto. At that meeting, the "Employer" bargained with the Union on the terms of a proposed Collective Bargaining Agreement. Each of the items in a Collective Bargaining Agreement form were discussed. Mr. Aiken, on behalf of Respondent at the time of the meeting made notes of the discussion on his copy. [Resp. Ex. 5; R. 284-286, 378-424].

On December 5, 1956, the General Counsel issued, on behalf of the Board, his Complaint in this case, based upon the alleged violations in the Charge of November 21, 1956 [R. 7-11].

On December 14, 1956, Mr. Doria and Mr. Aiken had a telephone conversation, discussing the meeting of December 4, 1956. At that time, Mr. Doria admitted that the form of Collective Bargaining Agreement which he had proposed at the December 4th meeting was extreme, and that his proposals for the Regent Street Plant involved a Union shop, a check-off, and an increase in wage rates in the amount of approximately twelve cents (12¢) an hour. Mr. Aiken requested that Mr. Doria put his proposals in writing, and Mr. Doria agreed that he would. He has not ever done so [R. 288-289].

4. "Employer's" Offer of Stipulation.

The "Employer" throughout these proceedings offered to stipulate and agree to a consent order whereby the purported Decision and Direction of Election and the Certi-

fication of Representatives on which it was based would be withdrawn, the unit of "Employer's" employees appropriate for the purposes of collective bargaining would be the single plant unit, with one unit consisting of the Avalon Plant and one unit consisting of the Regent Plant, and a self-determination election would be held at "Employer's" Avalon Plant, under the auspices of, and conducted by, the Board to determine whether or not the production and maintenance employees at the Avalon Plant, as defined in the said Decision and Direction of Election, desired to be represented by the Union. For this purpose, the "Employer" is willing to concede that a majority of the production and maintenance employees at the "Employer's" Regent Plant did favor representation by the Union [R. 208-210].

5. Facts Concerning Schism Within the Union and Basis for Review of Board Certification of Representatives and Decision and Direction of License Herein.

From May of 1955 until September, 1957, the officers of the Union consisted of one Nick Nardi as the President, and, in turn, Anthony Doria, Bradley Smiler and Peter Lentini as Secretary and Treasurer thereof.

On or about September 6, 1957, the said Union, United Industrial Workers, Local 976, AIW-AFL-CIO, by its Secretary, Peter Lentini, sent a letter to The Deutsch Company requesting notification of a date, time and place when negotiations might be conducted on a proposed agreement.

Thereafter certain persons, including Carl W. Griepentrog, Frank Evans and Bert Backinger, claiming to be, respectively, the President, an Executive Board Member, and a Vice President of the International Union, Allied

Industrial Workers of America, affiliated with AFL-CIO, called upon The Deutsch Company and its representatives and claimed to be the persons who are entitled to bargain with The Deutsch Company in connection with and as agent and exclusive representative of The Deutsch Company's employee's for the purpose of collective bargaining. Insofar as The Deutsch Company has been informed, neither Carl W. Griepentrog, nor Frank Evans, nor Bert Backinger were or are elected officials of United Industrial Workers, Local 976, AIW-AFL-CIO, but they have usurped the powers of the officials of the said Union and they are acting without any authority of the said Union and without complying with the Constitution or the By-Laws of the said Union. The Allied Industrial Workers of America, for which the said Griepentrog, Evans and Backinger claimed to be spokesman, is not, and never has been certified as the exclusive representative of any of the employees of The Deutsch Company. The said Union does not represent any of the employees of The Deutsch Company.

All of the officers of the Union which purported to be certified, including Anthony Doria, Peter Lentini, Nick Nardi and Bradley Smiler, have abandoned and discontinued their offices and said Union has either been dissolved or they have formed another and separate Union, as The Deutsch Company has been informed and believes.

By reason of the foregoing, there is no existing union which meets the description of the exclusive bargaining representative of The Deutsch Company's employees as set forth in the Certification of Representatives in this case. There is, therefore, no existing union which is certified as the exclusive bargaining representative for the employees of The Deutsch Company.

The Deutsch Company has received conflicting demands from certain persons consisting of said Peter Lentini and others, on the one hand to negotiate with them, alleging that they are officers of United Industrial Workers, Local 976, AIW-AFL-CIO, and from Evans and Backinger, on the other hand, purporting to be officers of the International Union, Allied Industrial Workers of America, affiliated with the AFL-CIO, alleging that negotiations must be conducted with them. There is apparently a conflict, and it is the belief of The Deutsch Company that neither of the groups involved is authorized to represent the employees of The Deutsch Company as the exclusive representatives for purposes of collective bargaining under the said certification of representatives or otherwise.

All of the foregoing was brought to the attention of the National Labor Relations Board by the Motion of The Deutsch Company for: (1) Rehearing and Reconsideration by the Board of its Decision and Order; and (2) an Order Setting Aside Previous Decision and Direction of Election; and (3) an Order Setting Aside the Previous Certification of Representatives and Amendment Thereto [R. 86-101].

On November 7, 1957, the Motion of The Deutsch Company was denied [R. 103-104].

6. The Refusal of the Board to Receive Evidence on the Issue of the Appropriateness of the Unit for Purposes of Collective Bargaining.

In the hearing on the charges of violations of Section 8(a), subsections (1) and (5) of the Act, The Deutsch Company offered to prove that since the time of the Representation Hearing the sentiment of the employees for representation by the Union in one of the plants was tested by a Consent Election under an agreement entered

into between the Union, all the members of the Union, and The Deutsch Company [R. 307-320].

The Union itself had recognized the substantial differences between the Employees at The Deutsch Company's Avalon plant and those at its Regent Street plant [R. 160-162]. The Board had also taken note of these distinctions prior to the agreement when, without any evidence or basis for evidence of the sentiment of the employees, it recognized in its Certification of Representatives that either a single-plant or a multi-plant unit would be appropriate for the purposes of collective bargaining for the Employees of The Deutsch Company [R. 211, 338-341].

After the conclusion of the Representation Hearing the sentiment of the employees at the Avalon plant was discovered to be substantially against representation by the Union. Notwithstanding, the Union charged The Deutsch Company with unfair labor practices for refusing to bargain, although there was uncontradicted newly discovered evidence which the Board should have heard in order to ascertain whether or not its prior decision in the Representation Hearing on the appropriateness of the unit was valid. These facts in connection with other relevant facts with regard to the appropriateness of the unit for the purposes of collective bargaining were specifically rejected by the Trial Examiner, although an offer of proof was made that there was newly discovered evidence and that there was evidence of a change of circumstances with regard to the question of the appropriateness of the unit which should have been heard by the Board in order to determine whether or not there was a valid basis for the charges of a violation of Section 8(a), subsections (1) and (5) of the Act [R. 316, 317]. This the Board refused to do. The Board in refusing to take the evidence acted arbitrarily and in the abuse of the discretion conferred upon it.

In the Representation Hearing the greatest amount of the time was taken up with the determination of whether or not certain persons were supervisors.

The little evidence with regard to the appropriateness of the unit for the purposes of collective bargaining which was heard at the Representation Hearing included the fact that there were two separate plants for the Company in different cities having different working hours and different shifts. There was further testimony that there was no history of interchangeability of the Employees between the two plants, each of which had separate supervision.

Following the taking of the testimony at the Representation Hearing, the Union was willing to stipulate to a separate plant unit appropriate for the purposes of collective bargaining [R. 189-195]. One of the intervening unions, however, which received no votes in any election, felt that the appropriate unit should be the entire employer unit. The Hearing Officer at the Representation Hearing believed that if the parties all should agree that there were two units, the Board would accept it.

The Union's organizational procedure, as stated at the Representation Hearing, was only to apply for the Avalon plant and to treat the Regent Street plant as an entirely separate organizational problem [R. 196-197].

In its Decision and Direction of Election [R. 338-341], the Board stated and found that the single plant unit would have been appropriate here, although it did conclude that the multi-plant unit was appropriate. However, the Decision and Direction of Election erroneously stated that the two plants were centrally administered, functionally integrated, had a uniform personnel policy and that the Employees at the two plants have similar skills. Out of these facts and others the Board concluded that a single unit at both plants would be appropriate.

If evidence on these erroneous impressions had been received by the Board, it would have satisfied the Board that the multi-plant unit was inappropriate and the single-plant unit was the appropriate unit for the purposes of collective bargaining. The Deutsch Company attempted to correct these errors and to bring other relevant and material facts to the attention of the Board by a Petition for Rehearing and Reconsideration by the Board of its Decision and Direction of Election, etc. [R. 425-446]. This Petition was denied without any hearing on the facts or arguments on the law. The Petition for Rehearing and Reconsideration had been pending, and the notice of the decision denying the Petition was not given to The Deutsch Company until after the Board had conducted its election.

It was an abuse of discretion by the Board and an arbitrary act by the Board to deny summarily the Petition for Rehearing and Reconsideration on these allegations without taking any testimony on the facts offered to the Board. It was this basic error which caused the difficulty which the Union, its members and the Employer attempted to resolve by their own agreement for a consent election in November.

At the time of the hearing on the 8(a)(1) and 8(a)(5) charges, The Deutsch Company again offered evidence of the additional facts to correct the errors of the Representation Hearing and the newly discovered evidence with regard to the sentiment of the employees against representation by the Union at the Avalon plant. This conclusively establishes that the single-plant unit is appropriate. Again, the Trial Examiner and the Board rejected the offer of proof and made the order without hearing any of the facts or the offered testimony. [R.

307-320]. This was an arbitrary act of the Board and the abuse of its discretion, because it made its orders without giving any consideration to relevant and material facts which should have determined its action.

7. The Refusal of the Board to Hear Any Facts Newly Discovered Involving a Change of Circumstances Because of the Schism in the Union.

Following the hearing on the 8(a)(1) and 8(a)(5) charges the Honorable Trial Examiner made his Intermediate Report and Recommended Order. On September 4, 1957 the National Labor Relations Board issued its Decision and Order adopting the findings and conclusions and recommendations of the Trial Examiner.

On or about September 6, 1957 demands were made by one Peter Lentini as secretary of the United Industrial Worker's Local 976, AIW-AFL-CIO demanding that The Deutsch Company commence bargaining with Local 976 through him. At the same time, certain persons, including Carl W. Griepentrog, Frank Evans, and Bert Bergbackinger, claiming to be, respectively, the President, an Executive Board Member, and a Vice-President of the International Union, Allied Industrial Workers of America, affiliated with AFL-CIO demanded that The Deutsch Company bargain with them as the agent and exclusive representative of The Deutsch Company's employees pursuant to the orders of the National Labor Relations Board. The company had been informed that the latter persons were not elected officials of Local 976, but that they had usurped the powers and functions of the officials of the Union and are acting without the authority of the Union and without complying with the constitution or by-laws of the Union. The International Union which they represent had never been certified as the exclusive

representative of the employees of The Deutsch Company. The Deutsch Company was informed that the existing officers of Local 976 had abandoned and discontinued their offices and functions and that it had been dissolved and was no longer in existence by reason of the schism and certain charges and litigation pending between the Local and the International. The conflicting demands for bargaining made it impossible for The Deutsch Company to comply with any order even if the order had been a lawful one.

The Deutsch Company brought these matters to the attention of the Board by a motion for Rehearing and Reconsideration of its Decision and Order, etc. [R. 97-101].

The Board summarily denied the Motion for Reconsideration and Rehearing based upon these newly discovered facts and change of circumstances without taking any evidence thereon [R. 103-104]. It was an abuse of its discretion and an arbitrary act of the Board to deny this Motion without a hearing and without taking any evidence on any of the facts alleged therein.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. The Supreme Court Should Grant the Petition for Writ of Certiorari Because the Decision of the United States Court of Appeals for the Ninth Circuit Is in Conflict With the Decisions of Other United States Courts of Appeal and the Decisions of the United States Supreme Court Where the National Labor Relations Board Refused to Receive and Consider Competent and Material Evidence Offered by Petitioner Which Amounted to a Denial of Due Process.

A. The National Labor Relations Board Failed to Afford a Fair Hearing by Refusing to Hear and Consider Testimony on the Schism Within the Union So That Petitioner and Its Employees Are Presented With an Unresolved Conflict of Claims by Two Unions Each Claiming to Be Certified and Demanding Recognition as the Exclusive Collective Bargaining Agent.

The Court of Appeals for the Ninth Circuit has ordered enforcement of the decree of the National Labor Relations Board against the Petitioner requiring the Petitioner to bargain with an exclusive collective bargaining representative of Petitioner's employees. The Board claims that the Petitioner has failed to bargain and therefore has violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.

The Board has, however, refused to hear significant and relevant evidence on several material issues in determining the designation of this exclusive collective bargaining representative.

The Order is impossible for Petitioner to obey because the Board has refused to take evidence, and make a determination on the evidence, upon the issue of whether

the union claiming to be the exclusive representative for purposes of collective bargaining is the representative for which Petitioner's employees voted and which was certified as such. Local 970 received the certification [R. 342-346]. But International Union, Allied Industrial Workers demands that Petitioner bargain with it pursuant to the Certification of Representatives [R. 97-101]. Petitioner could not with due diligence have alleged these facts at the time of the hearing.

The Board has committed reversible error in refusing to receive and consider evidence on the issue of whether the claimed bargaining representative is the one that was certified. If the Board refuses to take such evidence, the Court of Appeals on a Petition for Enforcement is not able to determine what the testimony might have disclosed on the material issue involved. Decisions of other Courts of Appeals and other decisions in the Supreme Court have consistently so held. In such cases the matter should be remanded to the Board with directions to reopen the hearing and hear the evidence.

> *Daily Review Corp. v. N. L. R. B.*, 192 F. 2d 259 (C. A. 2d 1951).

The rejection of relevant and material evidence is a denial of due process contrary to the provisions of the Fifth Amendment to the United States Constitution. The Board cannot hide behind the contention that the exclusion, even though erroneous, was harmless and should be ignored since it would not change the results. Judge Sanborn, writing the opinion in *Donnelly Garment Co. v. N. L. R. B.*, 123 F. 2d 215, at page 224 (C. C. A. 8, 1941) said:

> "That a refusal by an administrative agency such as the National Labor Relations Board, to receive and

consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate . . . that the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The truth is that a controversy tried before a Court or before an administrative agency is not ripe for decision until all competent and material evidence proferred by the parties has been received and considered."

See:

National Labor Relations Board v. Sidran Sportswear, 181 F. 2d 671 (C. A. 5, 1950);

National Labor Relations Board v. Burns & Gillespie, 207 F. 2d 434 (C. A. 8, 1953).

Both the National Labor Relations Act and the Administrative Procedure Act require the National Labor Relations Board to make its decision after affording each party the right to present his case or defense by oral or documentary evidence to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts and do not permit the Board to ignore material uncontradicted facts.

National Labor Relations Board v. Cleveland Trust Co., 214 F. 2d 95 (C. A. 6, 1954);

National Labor Relations Board v. Drennon Food products Co., ... F. 2d ..... 45 L.R.R.M. 2198 (C. A. 5, 1959);

Administrative Procedure Act, Sec. 7(c); 5 U. S. C. 1006 (b);

National Labor Relations Act, Sec. 10(c); 29 U. S. C. 160 (b).

The Administrative Procedure Act has given reviewing courts power to hold unlawful and set aside administrative actions, findings and conclusions under circumstances analogous to those here.

Administrative Procedure Act, Sec. 10(e), Subsections 1, 2, 3, 4, 5;

5 U. S. C., Sec. 1009, Subsecs. (e), (1), (2), (3), (4), (5).

Historically, the Supreme Court has determined upon the respect to be accorded decisions of the Board. It has been concerned, therefore, that hearings before the Board afford the parties a fair hearing by considering all material evidence. In *National Labor Relations Board v. Indiana & Michigan Electric Company*, 318 U. S. 9, 28 (1943), Mr. Justice Jackson stated:

> "The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings is heard and weighed."

Mr. Justice Black, dissenting in the same case, would not have objected to sending the matter back to the Board if the Board had denied the respondents an opportunity to offer newly discovered, which tended to show that witnesses to material facts relied on by the Board might be attacked on their credibility.

Here, the Trial Examiner and the Board refused to receive or consider any newly discovered evidence regarding the conflicting claims of the two unions, each claiming to be the one certified by the Board. The Board, therefore, attempted to find that Petitioner refused to bargain without meeting the issue of identifying the collective bargaining agent.

The Court of Appeals for the Ninth Circuit did not even touch upon the failure of the Board to receive and consider the evidence on this issue. The question was raised in Briefs of both Petitioner and Respondent and in Petitioner's Petition for Rehearing. The judgment of the Court of Appeals here conflicts with that of the Sixth Circuit on this question.

Where a question has been raised as to the identity of the representative of the employees, the Board is required to examine the facts that determine the substance of the situation, under the decisions of the Sixth Circuit. It must consider whether what has been done by the union has removed from the employees their basic statutory right to express their choice.

Dickey v. N. L. R. B., 217 F. 2d 652 (C. A. 6, 1954).

Heretofore the Ninth Circuit has at least required a consideration by the Board of the facts regarding a schism within the union before enforcing its order.

> *Carpenteria Lemon Association v. N. L. R. B.*, 240 F. 2d 554, 556-557 (C. A. 9, 1956), cert. den. 354 U. S. 909 (1957).

In *Carpenteria*, the Ninth Circuit held that it is important to determine the factual issues in ascertaining the right of a successor union to assume the status of a certified bargaining agent and determine whether the union is a continuation of the old union under a new name, or an affiliation, or whether it is substantially a different organization. In *Carpenteria* the factual issue was heard by the Trial Examiner. In the case now before this Court neither the Trial Examiner nor the Board ever heard or considered the facts with regard to the schism, and failed to afford even the semblance of a fair hearing.

The Supreme Court should now resolve the conflict presented by the decision below and the Opinion in the Sixth Circuit when a serious question of due process has arisen as here.

B. The National Labor Relations Board Refused to Hear and Consider Testimony of Evidence Newly Discovered Since, and Unavailable at the Time of, the Representation Hearings Material on the Issue of the Appropriateness of the Unit for Collective Bargaining Purposes.

As a condition precedent to determining and deciding whether Petitioner has violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain with an exclusive collective bargaining agent, the Board must consider and determine whether or not the union has been certified as the representative of the employee in an

appropriate unit. If the unit is not an appropriate one, then a refusal by the employer to bargain is not a violation of Section 8(a)(5) of the National Labor Relations Act.

Carson Pirie Scott & Co., 75 N. L. R. B. 1244 (1948);

National Labor Relations Act, Sec. 9(b); 29 U. S. C., Sec. 159(b).

If the Board acts arbitrarily in making its unit determination or if the Board's findings are unsupported by substantial evidence, then enforcement of the Order to bargain must be denied.

National Labor Relations Board v. Plankinton Packing Co., 265 F. 2d 638 (C. A. 7, 1959).

The issue here is not whether the Board could have made a determination that the appropriate unit was the single-plant unit, as the Court of Appeals for the Ninth Circuit stated in its opinion. Both the Board and the Court below did not consider the significant error in this case. The issue here is really whether or not the Board afforded a full and fair hearing in making its determination, and whether it made its decision in disregard of substantial evidence on the record considered as a whole.

National Labor Relations Act, Sec. 10(e); 29 U. S. C., Sec. 160(e).

It is respectfully submitted that the Board did not do so, and the Court below did not review the administrative proceedings as the Supreme Court has required under the pertinent legislation.

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951).

The Board itself recognized how close a decision was being made in deciding on the appropriate unit in its Decision and Direction of Election. The decision as to the appropriate unit could under the facts, not including those later discovered, have gone either way [R. 338-341]. It was incumbent upon the Trial Examiner and the Board to take, receive and consider the newly discovered evidence of the express wishes of the employees in reconsidering the unit question. This they failed and refused to do.

The findings of the Board based upon the representation hearing are not conclusive at the hearings upon the Complaint alleging unfair practice. It is incumbent upon the Board to afford a full opportunity to the parties to present all of the relevant facts. *Baker and Taylor Co.*, 109 N. L. R. B. 245 (1954), particularly because the decision and direction of election based upon the representation hearing is not subject to direct review.

American Federation of Labor v. N. L. R. B., 308 U. S. 401 (1940).

Because none of this evidence, such as the sentiment of the employees, the nature of their working conditions, and the craft skills of certain of the employees were fully explored at the time of the Representation Hearing, and because the evidence on the sentiment of the employees was unavailable at the time of the Representation Hearing, and newly discovered at the time of the hearings on the Complaint, the Board should have received and considered the evidence in making its determination. Its failure to do so establishes that its decision was based on only a portion of the evidence in the record.

This Court is not being asked to review the factual determination made by the Board. The questions raised here

are only that the Board could not have made its decision properly without a consideration of all of the facts. The Board should have received the additional evidence and then made its decision on the entire record. The failure of the Board so to do is a serious departure from proper legal and constitutional administrative procedures. This Court should, therefore, call upon the Board to take this evidence and reconsider its determination by remanding the case to the Board.

C. The Supreme Court Should Decide Whether the National Labor Relations Board Properly Afforded Due Process to the Petitioner and Its Employees When the Board Proceeded With an Election Which Was Marked by Confusion and at Which Only a Small Fraction of the Eligible Employees Voted, While Petitioner's Request for Rehearing of the Representation Issues Was Still Pending Before the Board.

The Board acted with unnecessary haste in conducting a certification election while confusion surrounded the circumstances of the representation hearing and the conduct of the election. Petitioner was still attempting to have a clarification of the issues on the questions raised at the representation hearing. A decision on its Petition for Rehearing had not been furnished to it.

Petitioner's employees at its Avalon plant are highly skilled machinists and have little in common with the Employees at Petitioner's Regent Street Plant or with the members of the Allied Industrial Workers Union which does not consist of skilled laborers. The Avalon employees conceivably could be more properly represented in a separate unit. They had no opportunity to consider and reflect on the issues before them on the election. The Board compounded confusion by pressing forward to

an election without preparation and adequate notice of the determination of the pending Petition which questioned the nature and manner of conducting the election.

As a result only a small fraction of the employees who could have voted did vote. This turnout should be compared with the almost unanimous number who voted a few months later at the private consent election held by the union and the Petitioner under N. L. R. B. rules, when the employees were given an opportunity to weigh the decision.

The issue here is not whether or not the secret consent election was legal or was binding. The issue is whether or not the Board's undue haste in the conduct of the election while the Petition was still pending is a serious departure from its administrative procedures which fails to afford a fair and proper basis for Petitioner's employees to make a determination of their desire for representation.

The Petitioner had a right to file its Petition for Reconsideration and apprise the Board of the error in its Decision and Direction of Election.

The Board provides in its Rules and Regulations, Code of Civil Regulations, Title 29-Labor, Section 102.68, that it will grant further hearings as it may determine.

National Carbon Co., 110 N. L. R. B. 2184 (1954);

Superior Sleep Right Corporation, 109 N. L. R. B. 322 (1954).

While this Petition for Reconsideration was pending and until a notice of its decision was given by the Board to Petitioner, the Board should have stayed the election.

In view of the legal rights available to Petitioner and the obvious results engendered by the confusion resulting

from the Board's haste, the results of the Board's election were dubious and inequitable. Where this occurs, the election should be considered invalid and a refusal of the employer to bargain with the union designated by that election should not be considered an unfair labor practice.

National Labor Relations Board v. Wilkening Manufacturing Co., 207 F. 2d 98 (C. A. 3, 1953).

The essential purpose of the National Labor Relations Act is to afford the employees the fullest freedom in exercising their rights to determine their collective bargaining representative.

National Labor Relations Board v. Globe Automatic Sprinkler Co., 199 F. 2d 64, 70 (C. A. 3, 1952);

National Labor Relations Act, Sec. 9(b);

29 U. S. C., Sec. 159(b).

It is important, therefore, that the Board recognize the sanctity with which the employees and the Petitioner approach such an election. To force an election hastily and without a proper determination and notice of decision of the issues underlying the basis upon which the employees will make their decision will prevent full and free expression by the employees. It deprives the employees of their freedom in exercising their rights to determine their collective bargaining representation.

Petitioner recognizes the rule established in *Brooks v. N. L. R. B.*, 348 U. S. 96 (1948), that it is the responsibility of the employer to petition the Board for relief if he has doubts about his duty to bargain. Petitioner has done this, but the Board has, nevertheless, ignored the

offer of evidence and has abused its processes to force a representative on employees in a questionable election.

This Court is not asked here to decide whether or not the secret private consent election was valid, but only that the Board and the Court of Appeals reconsider on all of the facts whether or not the Board election held in August of 1957 was a fair procedure to insure an expression by the employees of their desires in the exercise of the fullest freedom to be afforded to them.

This Court should remand this cause to the National Labor Relations Board to give full consideration to the facts concerning this election so that the issue of whether or not the Board's election was full and fair and complied with its own regulations and the law and the Constitution may be determined.

2. The Supreme Court Should Grant the Petition for Writ of Certiorari Because This Case Raises Important Questions of Law Vital to the National Policy of Peaceful Adjustment of Labor Disputes.

This past year has seen a recurrence of numerous bitter labor-management disputes throughout the country. Significant cases have already come before this Supreme Court for its consideration. The Congress has been deeply concerned with many of the problems faced by labor and management in this area and has been seeking to resolve these difficulties by legislation.

In the final analysis, however, the administration of the machinery to afford peaceful solutions of the problems confronting labor and management devolves upon the National Labor Relations Board. In the ensuing months, the Board and its Trial Examiners will be made increasingly aware of these responsibilities in providing full and

fair hearings on the issues presented to them for determination and in the conduct of elections.

This Court is not asked by this Petition for Writ of Certiorari to decide any of the factual issues presented to it. It is respectfully submitted that these may be determined by the Board and the Board's decision reviewed as required by law by the Court of Appeals for the Ninth Circuit. When, however, the Board has acted with unnecessary haste and in violation of the principles of fairness in conducting its election, and when the Board had made its judicial determination without hearing all of the testimony available to it, it is respectfully submitted the Board has acted arbitrarily and illegally. It is for these reasons that this Court is requested to grant this Petition for Writ of Certiorari. The Board's procedures in this case are indicative of what the Board is doing in other cases.

Some of the Courts of Appeals have been quick to note and rectify serious lapses from the recognized concepts of fair play and due process:

Donnelly Garment Co. v. N. L. R. B., 123 F. 2d 215 (C. A. 8, 1941);

Dickey v. N. L. R. B., 217 F. 2d 652 (C. A. 6, 1954);

N. L. R. B. v. Wilkening Manufacturing Co., 207 F. 2d 98 (C. A. 3, 1953).

But in the instant case the Court of Appeals has accepted the administrative decision in spite of the serious procedural defects.

This Supreme Court should exercise its powers of supervision to prevent a further departure from the accepted and usual course of judicial procedures in these National

Labor Relations Board matters and clarify its requirements of due process.

Only if the parties before the Board are assured of fair treatment under legal procedures can respect by both labor and management for the law be engendered. It is now vital in obtaining fair and proper adjustments of labor disputes throughout the nation, that this Honorable Court grant the Petition for Writ of Certiorari in order to resolve these important considerations in an important area in our national life today.

Conclusion.

For the foregoing reasons, it is respectfully submitted:

1. That this Petition for Writ of Certiorari should be granted.

2. That this case shoould be set down for argument.

Respectfully submitted,

LEON M. COOPER,

Counsel for Petitioner.

APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7 Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership

therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employee in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not

* * *

(2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation

* * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a);

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

SEC. 10(b) ". . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., Title 28, Secs. 723-B, 723-C).

SEC. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding, and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting side in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may

modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (3) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as

it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the Administrative Procedure Act, as amended, (5 U. S. C., Sections 1001, *et seq.*) are as follows:

ADJUDICATION

SEC. 5 In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign-affairs functions; (5) cases in which an agency is acting as an agent or a court; and (6) the certification of employee representatives—

* * *

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Sections 7 and 8.

* * *

ANCILLARY MATTERS

SEC. 6 Except as otherwise provided in this Act.—

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

DECISIONS

SEC. 8 In cases in which a hearing is required to be conducted in conformity with section 7—

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decisions of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10(e) "(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provision, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

United States Constitution, Fifth Amendment.

AMENDMENT (V)

No person shall be . . . deprived of life, liberty, or property, without due process of law.

Title 29, Code of Federal Regulations.

STATEMENTS OF PROCEDURE

AS AMENDED NOVEMBER 7, 1959

SEC. 102.68 (formerly Sec. 102.60) *Proceedings before the Board; further hearing; briefs; Board direction of, election; certification of results.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to direct a secret ballot of the employees or to make other disposition of the matter. Should any party desire to file a brief with the Board, seven copies thereof shall be filed with the Board in Washington, D. C., within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of that time not to exceed an additional 14 days. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed, and if submitted will not be accepted. Copies shall be served on all other parties to the proceeding, and proof of such service shall be filed with the Board at the time the briefs are filed. Requests for extension of time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing, shall be in writing and copies thereof shall immediately be served on each of the other parties. Requests for extention of time shall be made not later than 3 days before the date such briefs are due in Washington, D. C. No reply brief may be filed except upon special leave of the Board.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. The Deutsch Company, Respondent.

The Deutsch Company, Petitioner, vs. National Labor Relations Board, Respondent.

No. 15,889. April 8, 1959.

Petition for Enforcement and Petition to Modify and Set Aside Orders of The National Labor Relations Board.

Before: Fee, Chambers and Barnes, Circuit Judges Barnes, Circuit Judge:

This is a petition for enforcement of an order of the National Labor Relations Board issued against the respondent company on September 14, 1957. The NLRB had jurisdiction in this matter because respondent engages in interstate commerce in the manufacture of aircraft parts and components. This Court has jurisdiction of the petition for enforcement under § 10(e) and (f) of the National Labor Relations Act.[1]

The Board's order here rests on its finding that respondent, in violation of § 8(a)(1) and (5) of the Act,[2] refused to bargain with the union duly certified by the Board as the representative of employees of respondent in a single two-plant unit found by the Board to be ap-

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[1] 61 Stat. 147-49 (1947), 29 U.S.C. § 160(e) and (f) (1952), as amended.

[2] 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a)(1) and (5) (1952), as amended.

propriate. Denying the charge of unlawfully refusing to bargain, the company raises these principal defenses: (1) that the Board abused its discretion in finding a single two-plant unit rather than separate plant units to be appropriate; (2) that the election proceedings conducted by the Board were irregular; (3) that a private election conducted at one of the plants subsequent to respondent's refusal to bargain in the unit certified by the Board showed that a majority of the employees at that plant did not desire the union to represent them; and, (4) the union, by agreeing to the private election and participating therein, waived its right to represent the employees under the Board's certification.

I. Facts

On March 28, 1956, the union filed a petition with the Board requesting certification as the bargaining representative of the single unit comprising all of respondent's production and maintenance employees. These employees included those at both the respondent's Avalon Boulevard and Regent Street plants. The company took the position that the two plants should constitute two separate bargaining units. Two other unions intervened but took no firm position either way, although willing to accept the unit desired by the petitioning union.

On the question of the bargaining unit, the Board found, and the testimony adequately substantiates, that the appropriate unit was a two-plant or company unit. The specific facts relied on are essentially those based on a finding of "centralized administration and functional integration of the two plants, the similar skills of the employees, and the uniform personnel policy" of the company. The Board made it clear, however, that "a separate unit at each plant *could* be appropriate for collec-

tive bargaining." The company contends that there is a substantial difference between the items produced by the two plants, that the type of assembly work is different, and that the composition of the personnel at the two plants differ significantly, and that there is no uniform personnel policy with respect to the two plants. While it is possible to have found from the record that the first three of the company's contentions are true, the last contention is clearly unwarranted by the evidence. In any case, the points made by the company could or could not be taken as true, and the outcome would be the same.

An election was scheduled for August 8, 1956. On July 24, 1956 respondent filed a motion with the Board for a rehearing and reconsideration of its decision as to what was the appropriate unit, asking for a suspension of the election until the points raised were determined, and to permit the respondent to present further evidence, and other points. The principal contention in the petition seems to have been that the Board's determination was contrary to other similar cases, and that insufficient evidence was taken to justify its determination. This petition was denied by the Board on August 2, 1956, "for the reason that it presents no issues which were not previously considered by the Board." Somehow, this denial of the petition failed to reach respondent company until August 10, 1956. The copy of the Board's denial received by the company bore the notation "Delay due to GSA error not National Labor Relations Board." However, respondent admittedly had notice on more than one occasion between August 2nd and August 8th that the election would be held on the appointed day. A company officer conceded that he also "may have" been specifically advised that the motion had been denied.

The election was held on August 8, 1956 as scheduled. At the Avalon plant, because of respondent's refusal to permit the use of its premises for the election, polling booths were set up by the Board officials on the sidewalks outside the plant. Two hundred thirty of the approximately 460 employees eligible at both plants voted in the election—207 in favor of the union. *None of the parties at any time filed objections to the conduct of the election* (although the rules of the Board require that this be done in five days), and on August 20, 1956 the union was duly certified as the bargaining agent by the Board.

Following several telephone communications between the parties, the union's secretary-treasurer, Doria, wrote to the company on September 14, 1956, asking that a date be selected to commence negotiations for a contract covering the two plants. The company notified the union that all negotiations should be carried on through H. Devoe Rea & Associates, its designated representative. A meeting was held on September 26, 1956. At this meeting Rea of the above named firm apparently announced that it was the company's position that the Board election was invalid, that the election did not represent the desires of the employees, and that the union had therefore been improperly certified. He further indicated that the company was not going to engage in collective bargaining until the question of the bargaining unit was worked out. Rea agreed to see what the company intended to do on this issue. There was also some discussion of the problems between the company and the union but little more than that, and the statements of Rea noted above.

The Board's position is that the company refused to bargain collectively but wanted to bargain only on the

issue of the appropriate bargaining unit, and proper representation by the union. The company contends that it did bargain, but since the election was "invalid" it only bargained as far as it properly could. In any event, after considerable haggling, the union and the company agreed to conduct a private election at the Avalon plant to determine the employees' sentiments on the question of the union representing them. This agreement provided that if the union won, the company would bargain without further objection to the Board's unit finding; but that if the union lost, the union would refrain from any strikes or related pressure and the company would refrain from any anti-union activity "until the question of representation is tested and determined by the circuit court of appeals." In the meantime, Aiken of the Rea Firm, admitted in a letter to the Board's regional office that the company had refused to collectively bargain, but that it was justified by the invalidity of the Board's certification. All through its brief the company takes the position that the vote or private election at Avalon was the union's idea, while the Board asserts that the company forced the union into this election since the company refused to bargain until this issue was settled.[3]

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[3]Certainly the actions of the union during the negotiations with the company bear out the Board's contentions. The following notice to employees (quoted only in part) was issued by the union prior to the second "election":

"This Vote to Prove Union Majority Has Nothing To Do With the Government Vote Where the Union Won Election. This Vote Is Not a New Election.

The results of this vote will have nothing to do with the election that was conducted by the Government and which was won by the Union. This vote is only being taken in the hope that the results will make any further action by the Government unnecessary. This vote cannot change the results of the Government election. The Union will still be certified by the Government in both plants regardless of the outcome of this vote. This Vote Is Only for the

The Avalon vote resulted in a vote of 169 to 137 against the union. After the election, the parties again met and respondent company refused thereafter to discuss any contract covering the Avalon employees, and it was agreed that further negotiation was futile.

Upon the foregoing facts, the Board, affirming the trial examiner, concluded that the company had refused to bargain with the union in violation of § 8 (a) (1) and (5) of the Act. It refused to permit re-litigation of the appropriate unit question, rejected respondent's contention that the August election was invalid and held that the November election was without effect "as it was a private election conducted in only one of two plants

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Purpose of Proving the Union Majority in the Avalon Plant So That Instead of Going Through Months of Government 'Red Tape,' Contract Negotiations Can Start Immediately in Both Plants.

If Union Wins Vote:

1. Bargaining starts immediately in both plants.

2. All Government 'red tape' for enforcement will no longer be necessary.

3. From 3 to 18 months of time will be saved.

If Union Loses Vote in Avalon Plant:

1. The Union agrees to wait until the Government enforces the order for the Company to bargain on a contract.

2. The Union still remains certified as the Union in both plants of The Deutsch Company. Nothing will be lost.

3. The Deutsch Company will still start bargaining for a Union contract in the Regent Street Plant.

4. The company will not bargain in the Avalon Plant until the Government enforces the order to bargain.

The Answer Is Simple. We have the Majority in the Avalon Plant. Let's Prove It in the Vote on Friday. This Will Mean We Are Finally Off to the Contract! The Deutsch Company Has Agreed to This.

Only the people on the payroll of the Company as of July 9, 1956 will take part in this vote. This Can Be the End of Strikes and Work Stoppages.

United Industrial Workers Local 976
AIW-AFL-CIO"

which the Board had previously found constituted a single appropriate unit and in which the union was certified." Finally it rejected respondent's contention that it had bargained in good faith.

The Board then issued an order in its usual form requiring the company to cease its unfair labor practices and to take certain affirmative action.

II. Law

The essence of respondent's defenses and affirmative allegations of error is that the employees of the company have been deprived of their right to choose their collective bargaining representatives, and that the findings and conclusions of the Board are erroneous. This ignores the case of *Brooks v. Labor Board*, 1954, 348 U. S. 96, where Mr. Justice Frankfurter says at p. 103:

"Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may henceforth refuse to bargain. In effect, he seeks to vindicate the rights of his employees to select their bargaining representative. If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board. If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, *while continuing to bargain in good faith* at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention. The underlying purpose of this statute is industrial peace. *To allow employers to rely on employee's rights in refusing to bargain with the formally designated*

union is not conducive to that end, it is inimical to it." (Emphasis added.) Furthermore, on the question of the Board's findings, the clear language of the National Labor Relations Act, § 10 (e), is controlling: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole *shall be conclusive.*" There is no doubt from reading the record that there is substantial evidence supporting the Board's findings.

The respondent specifies in its brief some seven alleged errors which it argues under five major headings. We now consider them in turn:

(1) The question of the appropriateness of the two-plant unit is one which, as was already pointed out, even the Board found *could* have been decided either way. But as the NLRB says in its brief, this is a question within the broad discretion of the Board and will not be disturbed unless arbitrary or capricious. Pittsburgh Plate Glass Co. v. NLRB, 1941, 313 U. S. 146, 164-65; Foreman & Clark, Inc. v. NLRB, 9 Cir. 1954, 215 F. 2d 396; *Certs denied*, 344 U. S. 834. See also Packard Motor Car Co. v. NLRB, 1947, 330 U. S. 485, 491-92. Respondent offers against this legal position a discussion of the facts of *other* cases where the results differed. This does not demonstrate that the Board's actions are arbitrary or capricious, nor do we find they were.

(2) The question of the irregularities in the election of August 8, 1956 is, likewise one of ready solution. First, respondent failed to object to the election after it was held,[4] and not until the unfair labor practice charge

[4]The Rules and Regulations of the Board require that objections be filed within certain periods after the election or they are, in effect, deemed waived. See 29 C.F.R. § 102.61, which was in effect at the time.

came before the Board did it raise the issue. Second, the principal grounds under this point relied on by the company are that the election was irregular since not held on employer's premises and with less than all the eligible employees. Although the company had notice that the election was being held on that date, it refused to cooperate with the election at the Avalon plant (which undoubtedly resulted in a smaller number of employees participating) and forced the Board to hold the election off the premises of employer. An off-premises election was approved under similar circumstances in NLRB v. National Mineral Co., 7 Cir. 1943, 134 F. 2d 424, *cert. denied*, 320 U. S. 753.

Third, the question of the lack of a majority of those eligible to vote actually voting has been previously settled by several decisions.

It has repeatedly been held under well recognized rules attending elections that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting, so that such majority determines the choice.

Here there were 460 employees eligible in the two-plant unit designated as appropriate. Two hundred and thirty voted, and of those voting 207 voted in favor of the union certified by the Board as the bargaining agent.

The Supreme Court in Virginian Ry. Co. v. System Federation No. 40, 1937, 300 U. S. 515, 559, in interpreting similar language used in the earlier Railway Labor Act (45 U. S. C. § 151, *et seq.*) gave the answer which Judge Parker of the Fourth Circuit described as "conclusive" with respect to the National Labor Relations Act, and further, that any other conclusion was

"absurd."[5] N.L.R.B. v. Standard Lime & Stone Co., 4 Cir., 1945, 149 F. 2d 435, 436-39. And we observe that Judge Parker relied not only on his analogy between the

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[5] "And we see no reason to think that a different rule was intended by the National Labor Relations Act. The pertinent language of that act is: 'Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.' 29 U.S.C.A. § 159. There would seem to be no material difference between the meaning of this provision and of that contained in the Railway Labor Act. That the provision quoted from the National Labor Relations Act was intended to apply to the selection of bargaining agents by employees the political principle of majority rule, is expressly stated in the Report of the House Committee accompanying the bill, where it is said 'Section 9(a) incorporates the majority rule principle, that representatives designated for the purpose of collective bargaining by the majority of the employees in the appropriate unit shall be the exclusive representatives of all the employees, etc. Report No. 1147, of the House Committee on Labor to accompany S. 1958, June 10, 1935, 74th Cong., 1st Sess., p. 19. The majority rule principle was that which had been adopted in the Railway Labor Act. Its application in ordinary political elections to situations where a majority of the votes cast was less than a majority of those qualified to vote had been settled in Carroll County v. Smith, supra, and other decisions of the Supreme Court. The Virginian Railway decision gave it the same meaning when applied to industrial elections that it had when applied to ordinary political elections, and we see no reason to give it any different meaning here.

"Although there is no decision of the Supreme Court holding that a majority of the votes cast in an election is sufficient for the choice of a bargaining representative under the National Labor Relations Act, this is the holding of the Labor Board and of all of the Circuit Courts of Appeals which have had occasion to pass upon the question. See N.L.R.B. v. Central Dispensary & Emergency Hospital, App. D. C., 145 F. 2d 852, certiorari denied 65 S. Ct. 884; New York Handkerchief Mfg. Co. v. N.L.R.B., 7 Cir., 114 F. 2d 144, 148-149, certiorari denied 311 U. S. 704, 61 S. Ct. 170, 85 L. Ed. 457; N.L.R.B. v. National Mineral Co., 7 Cir., 134 F. 2d 424, 426-428, certiorari denied 320 U. S. 753, 64 S. Ct. 58, 88 L. Ed. 448; N.L.R.B. v. Whittier Mills Co., 5 Cir., 111 F. 2d 474, 477, 478; Marlin-Rockwell Corporation v. N.L.R.B., 2 Cir., 116 F. 2d 586, 588, certiorari denied 313 U. S. 594, 61 S. Ct. 1116, 85 L. Ed. 1548; Matter of Western Foundry Co., 42 N.L.R.B. 302; Matter of Spring City Foundry, 11 N.L.R.B. 1280; Matter of R.C.A. Mfg. Co. Inc., 2 N.L.R.B. 159, 173. There are no contrary decisions."

Two Acts, but on specific congressional language in the House Committee's Report on the National Labor Relations Act that "the bill is merely an amplification and

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."The company seeks to distinguish the Virginian Railway case and certain other of the decisions above cited on the ground that a majority of the employees participated in the elections there; but nothing in the statute furnishes the basis for such distinction. The statute requires that bargaining representatives be selected by the majority of the employees; and certainly a majority in favor of a representative cannot be scraped up by counting those who voted against him. The statute makes no provision for a quorum nor for the participation of any definite proportion of the employees in the election. It is, of course, the duty of the Board to see that the election is fairly advertised and held that the results are fairly representative of the wishes of the employees; but where these conditions are met and no undue pressure is exerted, there is no reason why the ordinary political rule should not be applied, viz., that those who do not take the trouble to vote acquiesce in the choice registered by the majority of those voting.

* * *

"There is every reason to apply the sensible political rule to elections of this sort, and no reason that we can see to the contrary. The elections are held, not for the purpose of choosing representatives for the employees in their private and personal capacities, but for the purposes of collective bargaining, i.e. for the purpose of setting up industrial democracy by choosing some one to represent the interest of the employees in determining the rate of wages, hours of work, living conditions, etc., for the plant. The establishment of such industrial democracy is the avowed purpose of the National Labor Relations Act, which declares it to be in the public interest because of its tendency to preserve industrial peace and prevent interference with interstate commerce. 29 U.S.C.A. § 151. This being true, it would be as absurd to hold that collective bargaining is defeated because a majority of employees fail to participate in an election of representatives as it would be to hold that the people of a municipality are without officers to represent them because a majority of the qualified voters do not participate in an election held to choose such officers. In the one case, as in the other, the representative is being chosen to represent a constituency because it is in the public interest that the constituency be represented; and all that should be necessary is that the election be properly advertised and fairly held and that the settled principle of majority rule be applied to the result. If the employees do not wish to be represented in collective bargaining they can so declare in the election; but where, as here, only a comparatively small number so express themselves the result should not be the same as if a majority had so voted. We pointed out in the Virginian Railway case the disadvantages and dangers which would follow from failure to apply the political rule in such elections." 149 F. 2d at 437-39.

further clarification of the principles enacted into law by the Railway Labor Act and by § 7 (a) of the National Industrial Recovery Act, 48 Stat. 198. . . ." (Report of Committee on Labor to accompany S. 1958, H. R. Rep. No. 1147, 74th Congress, 1st Sess. 2 (1935).) and points out that Congress knew and understood that the Railway Labor Act was so interpreted by the Senate Committee's Report on the 1934 Amendment, wherein it was stated: "The bill specifically provides that the choice of representatives in any craft shall be determined by *a majority of the employees voting on the question.*"[6] (Emphasis supplied by Judge Parker)

The rule of law enunciated in the Standard Lime & Stone Co. case, *supra*, was applied to an election where no hostile nor unfair influence or intimidation existed on the part of the employer. There is even more reason to follow the rule in those cases where the employer has attempted to discourage or prevent the election of the bargaining agent.

In NLRB v. National Mineral Co., *supra*, the Seventh Circuit considered such a situation, after but 83 out of 453 employees voted. Seventy-one voted for the union, 11 against, and 1 ballot was not counted. There the court, speaking through Judge (later Justice) Minton, reemphasized its previous decision in New York Handkerchief Mfg. Co. v. NLRB, 7 Cir. 1940, 114 F. 2d 144, 149, and stated:

"The unfair labor practices and the hostile, noncooperative attitude of the company may very properly account for the failure of many employees to vote. The employees' lack of interest, always a factor in every election, kept others from the polls. If they chose, without fear or intimidation, to stay away, they cannot complain

[6] 149 F. 2d at 437, n. 2.

that others have in effect exercised their franchise." 134 F. 2d at 428.

In the New York Handkerchief case, supra, 56 out of 225 employees had voted. Certain acts by the employers caused the minority vote.

In NLRB v. Central Disp. & E. Hospital, D.C. Cir. 1944, 145 F. 2d 852, 854, Judge Arnold considered the problem, and particularly whether the rule that a majority of the minority controls only when there has been some hostile or restrictive act on the part of an employer. In rejecting any such test, the opinion comes to the conclusion that the cautionary language in the New York Handkerchief case[7] does not establish "any rigid rule requiring the vote of a majority of all employees, in the absence of employer coercion. . . . The real test is whether the election is actually representative. This is always a question of fact in the particular case." Like any other authority, it must not be employed arbitrarily.

The Central Dispensary case then concludes:

"It is . . . argued that the language of the Act referring to representatives selected for the purposes of collective bargaining 'by the majority of the employees in a unit appropriate for such purposes' [29 U.S.C. §151, 159(a)] excludes an election by a minority.

This question seems to us to be settled by the Virginian Railway case [citing and quoting it]. This case has been followed by both the Courts and the National Labor Relations Board."

Here there is cited the Handkerchief case, supra (7th Cir.), the National Mineral case, supra (7th Cir.), Mar-

[7] "It does not follow, however, that the Board could justify itself in the exercise of such authority in every case regardless of the number who participated in the election." 114 F. 2d 144, at 149.

lin-Rockwell Corp. v. NLRB, 2 Cir. 1941, 116 F. 2d 586; NLRB v. Whittier Mills, 5 Cir. 1940, 111 F. 2d 474, 477; Matter of Western Foundry Co., 42 N.L.R.B. 302; Matter of Spring City Foundry, 11 N.L.R.B. 1286; Matter of R.C.A. Mfg. Co., Inc., 2 N.L.R.B. 159.

It should be noted that certiorari has been denied by the United States Supreme Court in the Handkerchief case,[8] the National Mineral case,[9] the Central Dispensary case,[10] and in the Standard Line & Stone case.[11]

Finding no adjudicated cases to the contrary, we can only conclude that these illustrate the prevailing view.[12]

(3) We next consider the validity of the second "election" upon which respondent places considerable emphasis. The brief of the company insists that the union agreed that the election would be held to determine if the employees at Avalon wanted this union to represent them and that if the union lost it would not make any further attempts to bargain for that particular plant. The agreement did say this, but it also added "until the question of representation is tested and determined by the circuit court of appeals." The union *never* put itself in the position the company claims it did, but always made clear that it would temporarily take a position so that it could get something done in the way of a contract, which the employer would not otherwise consider. As the NLRB points out, the situation is similar to McQuay-Norris Mfg. Co. v. NLRB, 7 Cir. 1940, 116 F. 2d 748, 751-52, cert. denied, 1941, 313 U. S. 565, where a union

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[8]311 U. S. 704.
[9]320 U. S. 753.
[10]324 U. S. 847.
[11]326 U. S. 723.
[12]See, 18 Am. Jur., Elections, § 243 (1938).

made an agreement with the employer so that some sort of contract negotiations could commence. The union as well as the employer was bound to accept the Board's determination of the bargaining unit and could not lawfully bargain for less than the whole group of employees in the bargaining unit determined by the NLRB, even it it wanted to do so. Steele v. Louisville & Nashville R.R. Co., 1944, 323 U. S. 192. Cf. National Licorice Co. v. NLRB 1940, 309 U. S. 350, 362, 364, to the effect that rights under the labor laws are public as opposed to private rights of the parties. Secondly, the union did not agree to give up entirely if it lost the election. As was previously pointed out, all the union did was to agree to this election so that bargaining could commence as to at least one plant. Thirdly, this election cannot in any way bind the NLRB since it was extra-legal. Agreements between the parties are not binding on the NLRB. NLRB v. American Potash & Chemical Corp., 9 Cir. 1940, 113 F. 2d 232, 234-35.

(4) Respondent's contentions on the last major point amount to a claim that the union, by entering this agreement for a private election, has now waived any rights it may have had under the NLRB order. This is, of course, unnecessary to reach since it is obvious that the agreement was not a waiver of the union's rights. We have discussed this in point (3) above.

Finally, there is the point underlying all of respondent's claims, that the company did bargain in good faith. This is manifestly a question of fact, and could be found untrue from the record and admissions of the company's own representatives.[13]

[13]See, e.g., statements of the manager, Philip Holzman, R. 350, 359, 360; and the letter of Aiken of Rea Associates to the regional office of the NLRB, R. 353, 354.

The crux of this dispute is in what the company was willing to bargain about. It was only willing to discuss the problem of representation, and the appropriate unit question. It is well settled that these questions are *not* for the parties to discuss and are outside the realm of collective bargaining. See Douds v. International Longshoremen's Ass'n, 2 Cir. 1957, 241 F. 2d 278, 282. Compare also the holding in NLRB v. Retail Clerks Intl. Ass'n, 9 Cir. 1953, 203 F. 2d 165, 169-70, to the effect that unions may not condition their duty to bargain collectively for the bargaining unit which they represent upon the employer's bargaining with a class of employees *outside* the unit. From the record it appears plain that the company *did* refuse to bargain collectively as charged, and this is an unfair labor practice.

We find no other points necessary to discuss here. The petition for enforcement of the NLRB order is granted. The petition to modify and set aside orders of the NLRB is denied.

(Endorsed:) Opinion. Filed April 8, 1959.

Paul P. O'Brien, Clerk.